

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>CHANNEN RAY OZELL SMITH,</b>	)	
	)	
Petitioner,	)	
	)	
v.	)	<b>Case No. 24-CV-0077-SHE-MTS</b>
	)	
<b>MARGARET GREEN, Warden,<sup>1</sup></b>	)	
	)	
Respondent.	)	

**PRE-ANSWER MOTION TO DISMISS 28 U.S.C. § 2254**  
**PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY**

Comes now Respondent, by and through the Attorney General of the State of Oklahoma, Gentner F. Drummond, respectfully asking that the instant 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus be dismissed as untimely, pursuant to 28 U.S.C. § 2244(d)(1). Respondent moves pursuant to this Court’s March 19, 2024 order directing a response to the petition. (Doc. 5). Respondent is contemporaneously filing a brief in support of this motion, which more fully explains and supports his position.

This is a pre-answer motion. This Court directed Respondent “to respond to the allegations in the Petition . . .” (Doc. 5 at 1). This Court also provided, however, that “[i]f a clear procedural bar exists and supports dismissal of the entire Petition, Respondent may file a motion to dismiss the Petition.” (Doc. 5 at 1). Respondent makes this point because the Tenth Circuit recognized in *Fontenot* that Rule 5(b) of the *Rules Governing 2254 Cases* “clearly differentiates between the

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<sup>1</sup> As Petitioner noted in his May 8, 2024 notice to this Court, he is now housed in Mack Alford Correctional Center in Atoka, Oklahoma. (Doc. 10). Petitioner had previously been incarcerated at the R.B. Dick Conner Correctional Center in Hominy, Oklahoma. (Doc. 1; Doc. 6, n.1). Respondent therefore respectfully asks this Court to substitute Margaret Green, the state officer who has custody of Petitioner, as the appropriate respondent. *See* Rule 2(a), *Rules Governing Section 2254 Cases in the United States District Courts*; Fed. R. Civ. P. 25(d).

merits of a habeas petition and any potentially applicable procedural defenses, and mandates that a state *must* address both in its answer.” *Fontenot v. Crow*, 4 F.4th 982, 1058 (10th Cir. 2021). But the Tenth Circuit recognized an exception to this rule where “a district court expressly authorizes a respondent to file a specific motion of some type,” in which case Respondent can file a pre-answer motion to dismiss without waiving the right to file a later merits response should the motion be denied. *Id.* at 1058-59.<sup>2</sup>

Respondent reads this Court’s order directing a response to provide for the option of a motion to dismiss, challenging the petition as untimely and unexhausted, as an alternative to a “full-blown answer contemplated by Rule 5,” *id.* at 1060, and prior to an assessment of each ground for relief on the merits. (Doc. 5). *See* 28 U.S.C. § 2244(b). If this pre-answer motion to dismiss is denied, Respondent respectfully submits that he is entitled under *Fontenot* to further briefing to address the claims raised by the petition.

Wherefore, for the reasons contained within Respondent’s brief in support, Respondent respectfully asks that this Court dismiss the instant habeas petition as untimely.

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<sup>2</sup> The State maintains, as it did in the *Fontenot* litigation, that it had always been the common practice in all three federal districts in Oklahoma to file motions to dismiss, where appropriate, without regard to the language of the specific order calling for response and without waiving the right to file a merits response. Indeed, it would seriously “undermine[] AEDPA’s goal of streamlining federal habeas proceedings,” if the State had to regularly address in the alternative the merits of time-barred habeas petitions. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Still, even under *Fontenot*, Respondent takes the language of this Court’s order calling for a response to allow for a pre-answer motion to dismiss. (Doc. 7).

Respectfully submitted,

**GENTNER F. DRUMMOND  
ATTORNEY GENERAL OF OKLAHOMA**

**s/ RANDALL YOUNG**  
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**ATTORNEYS FOR RESPONDENT**

**CERTIFICATE OF SERVICE**

**X** I hereby certify that on May 20, 2024, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing.

**X** I hereby certify that on May 20, 2024, I served the attached document electronically on the following, who not is a registered participant of the ECF System:

Channen R. Smith, #569312  
Mack Alford Correctional Center  
P.O. Box 220  
Stringtown, Oklahoma 74569-0220

**s/ Randall Young**